12

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 783

In the Matter of

NEW STRAND THEATRE, INC.,
Bankrupt,

MORRIS RATETT,
Petitioner,

LEO KAPLAN, Trustee in Bankruptcy of New Strand Theatre, Inc.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX.

	PAGE
Opinions Below	1
Statement of the Facts	2
Jurisdiction	3
Question Presented	4
Statute Involved	4
Specifications of Error Urged	4
No Reason Exists for Granting Writ	5
I. The referee did not approve the sale to Ratett nor abuse his discretion in refusing to confirm the Ratett bid	5
II. The decision of the courts below are not in conflict with the decisions of courts of other circuits or this court as to what constitutes a judicial approval of a bankruptcy sale	7
III. Four cases cited in petitioner's Point I do not conflict with the holding of the lower courts that the referee did in fact not approve the sale	10
IV. Cases in all circuit courts are in harmony with the principle enunciated in this case, that confirmation of a sale under Section 70(f) is a matter of approval in the sound discretion of the court	12
Conclusion	13

TABLE OF CASES CITED:

PAGE

Bovay v. *Townsend*, 8 Cir., 78 F. 2d 343 7

Bryant v. *Stockhausen Co. Inc. et al.*, 4 Cir., 271 F. 921 7

Burr Mfg. & Supply Co., In re, 2 Cir., 217 F. 16 .... 7, 8

Camden v. *Mayhew*, 129 U. S. 73 11

East Hampton, 2 Cir., 48 F. 2d 542 7

Files v. *Brown*, 8 Cir., 124 F. 133 11

Jacobsohn v. *Larkey*, 3 Cir., 345 F. 538 ..... 7, 8

Klein's Rapid Shoe Repair Co., In re, 2 Cir., 54 F. 2d 495 7

Pewabic Mining Co. v. *Mason*, 145 U. S. 349 ..... 7, 8

Prentice v. *Boteler, et al.*, 9 Cir., 41 F. 2d 175 9

Reid v. *King*, 4 Cir., 157 F. 2d 868 .....9, 12

Rival Knitting Co., In re, 2 Cir., 289 F. 960 11

Shea, In re, 1 Cir., 126 F. 153 11

Smith v. *Save-Rite Drug Stores*, 10 Cir., 178 F. 2d 507 . . ..9, 10

Stanley Engineering Corporation, In re, 3 Cir., 164 F. 2d 316 .....8, 10

Sturgiss v. *Corbin*, 4 Cir., 141 F. 1 9

Wolke Lead Batteries Co., In re, 6 Cir., 294 F. 509 .. 7

OTHER AUTHORITIES CITED:

Bankruptcy Act, Section 70(f) (11 U. S. C. 110 (b)) 4, 5, 9, 12, 13

General Order 41 3

28 U. S. C. 1254 3

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Opinions Below

The referee in bankruptcy refused to confirm a trustee's sale of a motion picture theatre to one, Morris Ratett (R. 26), and ordered a resale on competitive bidding based on a higher offer. On review Judge Edward A. Weinfeld in a comprehensive opinion affirmed and extended the time of sale (R. 2-8 incl.). The Court of Appeals affirmed on the opinion of the District Court (R. 28).

Statement of the Facts

The facts are not disputed. On December 5, 1952, the trustee in bankruptcy conducted a sale of a motion picture theatre before Referee Arthur J. Doran. Ratett was the highest bidder at $18,700, subject to various liens. This bid was less than 75% of the court appraisal which was $41,725. The assessed valuation of the realty exclusive of the personal property, was the sum of $46,000. During the course of the bidding the referee stated that the sale was subject to confirmation.

The trustee recommended acceptance in view of the fact that the bidding had been spirited and he knew of no other bids which had been made (R. 12). The referee thereupon stated that an order should be submitted without commenting on the trustee's recommendation. The statement appearing in the minutes, "Assets sold to Morris Ratett, Mt. Kisco, New York, for $18,700" (R. 12), was not the referee's statement. In the original record a space of four lines appears between the last statement of the referee and the aforementioned comment. The District Court did not find it to be part of the referee's comment and any other inference is erroneous.

Prior to the submission of the order of confirmation and on December 8, 1952, the trustee received an offer of $20,000 over and above all liens, accompanied by a certified check in the sum of $5,000 from one, Samuel Rogowsky, one of the bidders at the sale. The trustee's attorneys, in submitting the proposed order of confirmation of the Ratett offer, advised the referee of the new offer of Rogowsky. Thereafter,

and on December 11, 1952, the trustee received a bid of $25,000 over and above all liens from one, Florence Rosenbloom, who had not been present at the sale, accompanied by a cashier's check in the sum of $5,000.

The referee thereafter held a hearing on notice to the interested parties to consider the rejection or confirmation of the Ratett offer. His findings of fact and conclusions are as follows:

"(1) That the rejected bid was below 75% of the appraised value of the property; and

(2) The higher of the increased bids exceeded by $6300.00, or almost 35%, petitioner's rejected cash offer." (R. 7).

After affirmance by the District Court and the Court of Appeals, the assets were sold on February 6, 1953 at a newly conducted sale, in accordance with the order of the District Court, to the highest bidder for $25,000 above the liens. Petitioner, therefore, is in effect claiming that he is entitled to the difference between his bid of $18,500 and this sum of $25,000, or the sum of $6,500.

The referee's findings have not been shown to be clearly erroneous within the meaning of General Order 41 and, accordingly, were accepted by the District Court (R. 7).

Jurisdiction

Petitioner claims jurisdiction under 28 U. S. C. 1254, formerly in part, 28 U. S. C. 347, but no conflict

of circuits or interpretation of the Bankruptcy Act exists.

Question Presented

There is only one question presented for consideration: Did the referee in fact approve the sale to Ratett and, therefore, was there an abuse of his discretion in refusing to confirm the bid and in ordering a new sale (R. 4, 5). This is the sum and substance of petitioner's presentation of questions (Petitioner's Brief 2, 3).

Statute Involved

The applicable part of Section 70 (f) of the Bankruptcy Act (11 U. S. C. 110 (b)):

> ". . . Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. . . ."

Although the statute was involved in the analysis of the problem, no question involving its construction was raised.

Specifications of Error Urged

The six specifications urged reiterate petitioner's questions (Petitioner's Brief, 2, 3).

No Reason Exists for Granting Writ

I.

The referee did not approve the sale to Ratett nor abuse his discretion in refusing to confirm the Ratett bid.

Although Section 70(f) "does not specify any particular form of approval" (R. 5) of a judicial sale, yet there never has been any question but that the flexibility of the section is necessary for the application of judicial discretion. The conclusion of what constitutes approval is a question to be determined by the facts of each case. The facts were determined adversely to petitioner. The District Court held (R. 5):

> "To spell out approval, petitioner must rely upon the actions of the trustee and Referee in connection with the events of the sale and those subsequent thereto. It is stating the obvious that the recommendations of the trustee and his attorney and their actions at the sale and subsequent thereto are not binding upon the Referee. An accepted bid by a trustee makes the bidder no more than the one whose proposal has been recommended. Sales under §70 of the Bankruptcy Act are not complete until confirmed, and no action or conduct by the trustee can serve to establish such approval which involves the exercise of the court's discretion.
>
> Thus, I come to the remaining ground which petitioner advances to support his claim of an— in fact approval, the Referee's statement, 'Submit

> order', made at the conclusion of the sale and following the trustee's recommendation of acceptance of the bid. Any inference of approval, sought to be drawn from the direction for the submission of a proposed order, is negatived by the fact that the Referee signed no order of approval, made no statement of approval and stated during the course of the spirited bidding: 'This is subject to confirmation.' Finally, §70(f) of the Bankruptcy Act, which gives the court power to confirm or set aside a sale of the bankrupt's property, requires the exercise of judicial discretion, and this may not be inferred. Judicial discretion is positive action taken in clear and unmistakeable terms."

In holding that there was no abuse of discretion, the District Court cited the Referee's findings with approval (R. 7):

> "Under General Order 47 of the Supreme Court, the Referee's findings of fact are to be accepted by the district court unless clearly erroneous. under these circumstances, it cannot be held that the failure to accept petitioner's bid, even though it was the highest one at the original sale, was an abuse of discretion."

II.

The decision of the courts below are not in conflict with the decisions of courts of other circuits or this court as to what constitutes a judicial approval of a bankruptcy sale.

1. The District Court cited *In re Klein's Rapid Shoe Repair Co.,* 2 Cir., 54 F. 2d 495, for two propositions (R. 5):

> "(1) An accepted bid by a trustee makes the bidder no more than the one whose proposal has been recommended. (2) Sales under §70 of the Bankruptcy Act are not complete until confirmed . . ." (R. 5).

(a) The *Klein* case, *supra,* cited with approval *In re Burr Mfg. & Supply Co.,* 2 Cir., 217 F. 16, *In re Wolke Lead Batteries Co.,* 6 Cir., 294 F. 509, *Bryant* v. *Stockhausen Co. Inc. et al.,* 4 Cir., 271 F. 921, and the *East Hampton,* 2 Cir., 48 F. 2d 542, holding at p. 496 (R. 6):

> ". . . Section 70 of the Bankruptcy Act (11 U. S. C. A. §110) gives to the District Court the power to confirm or set aside, in its discretion, a sale of the bankrupt's property . . ."

2. The *Wolke* case (6 Cir.), *supra,* was cited by the court for the holding that "petitioner as the highest bidder (has) no enforceable interest which compels automatic confirmation of the sale. The matter is still one of the court's discretion" (R. 6).

3. *Jacobsohn* v. *Larkey,* 3 Cir., 345 F. 538, *Bovay* v. *Townsend,* 8 Cir., 78 F. 2d 343, and *Pewabic Mining*

Co. v. *Mason,* 145 U. S. 349, were all cited for the holding that the public at large be given notice of the resale (R. 7).

4. The case relied upon most by petitioner in the lower court and in this court, is *In re Stanley Engineering Corporation,* 3 Cir., 164 F. 2d 316. The District Court distinguished it from the case at bar (R. 6):

> "*In re Stanley Engineering Corporation,* 3 Cir., 164 F. 2d 316, cert. denied 332 U. S. 847, decided subsequent to *Klein's Rapid Shoe Repair Co., supra,* and so heavily relied upon by petitioner in support of his position, is readily distinguishable. There, the bid not only exceeded 75% of the appraised value, but was substantially in excess of the appraised value. Thus, it cannot be held as authority to require, in effect, automatic approval of the highest bid submitted at a fairly-conducted sale where the bid is below 75% of appraisal. To so hold would result in judicial repeal of §70f of the Bankruptcy Act, which, as noted, involved the exercise of discretion by the court where the bid is less than the stipulated percentage."

(a) But the court did more than merely distinguish the case; it cited it with approval (R. 7 note 4). Furthermore, the *Stanley* case, *supra,* as cited in petitioner's brief (pp. 12, 13 and 14) cited with approval two cases of the Court of Appeals, *Jacobsohn* and *Burr, supra,* and the Supreme Court case of *Pewabic Mining Co., supra.* All were cited with approval by the lower court.

(b) Having adopted the logic and reasoning of the cases cited by petitioner in his Point II, and having

approved the principal cases cited by petitioner, it is difficult to see how the court erred.

5. The remaining three cases cited by petitioner in his Point II do not support his position.

(a) *Prentice* v. *Boteler, et al.,* 9 Cir., 41 F. 2d 175, sustains respondent's contention (p. 176):

> "It is well established that where a district court upholds the confirmation by a referee in bankruptcy of sale made by a trustee in bankruptcy, this court will not interfere in the absence of a clear showing of abuse of discretion. *Coulter* v. *Blieden,* 8 Cir., 104 F. 2d 29; *Kimmel* v. *Crocker,* 10 Cir., 72 F. 2d 599, 600; *In re Hagerstown Silk Co.,* 4 Cir., 69 F. 2d 790, 792; *Currin* v. *Nourse,* 8 Cir., 66 F. 2d 137, 140; *In re Wolke Lead Batteries Co.,* 6 Cir., 294 F. 509, 511; *Jacobsohn* v. *Larkey,* 3 Cir., 245 F. 538, 542, L. R. A. 1918C, 1176."

(b) *Sturgiss* v. *Corbin,* 4 Cir., 141 F. 1. The additional bid was only 4% higher than original bid. It is noteworthy the court had already set aside one sale. No discussion of Section 70(f) was involved.

(c) In *Smith* v. *Save-Rite Drug Stores,* 10 Cir., 178 F. 2d 507 (Petitioner's Brief 9 and 10), the additional bid was again only 5% in excess of the original bid. The court cited with approval, *Reid* v. *King,* 4 Cir., 157 F. 2d 868 (p. 509):

> "The Reid bid was substantially inadequate and below the fair market value of the property and that, under the circumstances, the court was justified in accepting the Roberts bid and confirming the sale to him."

It is obvious that a different result would have occurred in the *Smith* case if the facts were those at bar. At page 510 the court stated:

> "We are of the opinion that if the court, on a proper showing, had found that the Smith bid was inadequate and substantially below the fair market value of the property, it might have rejected all of the bids and ordered a new sale, but that the court did not do. It undertook to keep the confirmation of the Smith bid open until it could ascertain if a higher bid could be obtained."

The court also cited the *Stanley* case, *supra,* with approval and for the same principle cited below (p. 510):

> "That it was an abuse of discretion for a bankruptcy court to fail to confirm a sale which was properly conducted, which produced a bid in excess of the appraised value of the property, in the absence of unfairness, fraud, or mistake, or gross inadequacy of price . . ."

III.

Four cases cited in petitioner's Point I do not conflict with the holding of the lower courts that the referee did in fact not approve the sale.

As was shown in I *supra,* there was never any informal approval of the sale. The District Court made this quite clear in its opinion (R. 5). Nevertheless, petitioner endeavors to show by four cases that an informal approval can be given. The facts

of the cases do not show any parallel or similarity nor are they in conflict with the case at bar.

1. *In re Shea,* 1 Cir., 126 F. 153, cited on page 8 of petitioner's brief, supports respondent's contention. Although no one can seriously contend that headnotes constitute the holding of the court, nevertheless, petitioner cites them for the purpose of showing that a sale can be implied from conduct. The facts, however, and the citation on page 8 of petitioner's brief show no parallel with the case at bar.

2. *Files* v. *Brown,* 8 Cir., 124 F. 133 (p. 8 of Petitioner's Brief), was not a bankruptcy case, but nevertheless, even there the question was whether the bid had been accepted by the court.

3. *Camden* v. *Mayhew,* 129 U. S. 73 (p. 9 of Petitioner's Brief), dealt with the rights of parties where a bidder desired to withdraw his offer and the case held that the court could, without confirming the sale by a formal order, have held him and ordered a resale.

4. *In re Rival Knitting Co.,* 2 Cir., 289 F. 960 (p. 10 of Petitioner's Brief), cited the *Camden* case, *supra,* with approval, and it likewise dealt with the situation involving a purchaser, refusing to perform his bid. Its irrelevance is seen from the citation at page 963:

> "Where a purchaser refuses, without cause, to make his bid good, he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale is had. *Camden* v. *Mayhew,* 129 U. S. 85, 9 Sup. Ct. 249, 32 L. Ed. 608."

IV.

Cases in all circuit courts are in harmony with the principle enunciated in this case, that confirmation of a sale under Section 70(f) is a matter of approval in the sound discretion of the court.

The principle was clearly enunciated by the court in *Reid* v. *King,* 4 Cir., 157 F. 2d 868, where the court stated in summarizing the rule for judicial sales (p. 870):

> "The matter is well summed up in the following passage from 4 Collier on Bankruptcy, 14th Ed., Sec. 70.98 at pp. 1584-1586 as follows:
>
> " 'Generally speaking, however, confirmation may be denied on the basis of inadequacy of price where there is a substantial disparity between the bid or contemplated sales price and the appraised or fair market value, and (1) where there is a reliable degree of probability that a substantially better price will be secured by a resale or (2) some element, however slight, of unfairness on the part of the purchaser. This represents a compromise between the policy of strengthening public confidence in the stability of judicial sales and that of strengthening the court's hands in its efforts to secure the best possible result for the benefit of the estate under its protection . . .' "

The case at bar falls within the foregoing rule. There was a substantial disparity between the bid price and the appraised value of the property, ap-

proximately $10,000. And a $5,000 cashier's check was deposited to secure the substantially better price which a resale would offer. Furthermore, there was a difference of approximately $6,500 between Ratett's offer and the additional bid.

Conclusion

Petitioner has failed to show that the decision in this case is in conflict with decisions of any other circuit court or of this court. As a matter of fact, petitioner has proved that all courts agree:

(1) That Section 70(f) involves the exercise of judicial discretion in the approval of a sale.

(2) That in a bankruptcy sale which brings less than 75% of the appraised value, the court can reject an offer and order a resale upon adequate notice to all parties.

(3) Approval of a sale need not be by a formal order but clear convincing unequivocal conduct may constitute such approval.

(4) That disapproval will not be reversed unless a clear abuse of discretion is apparent.

(5) Public confidence in judicial sales is not diminished where the sale is less than 75% of the appraised value and inadequate bids require the resale of trust property.

Not one of petitioner's cases, when analyzed in the light of the particular facts existing in each case, dispute these conclusions.

The harmony existing in all courts is further emphasized by the frequent interchange of citations in all circuits of decisions of other circuits. In fact, the very cases cited by petitioner as being in conflict, have been approved by the courts below.

No reasons for review by this court having been shown, the petition for writ of certiorari should be denied.

Respectfully submitted,

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53 77